

These are the tentative rulings for civil law and motion matters set for Tuesday, October 15, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Friday, October 11, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

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**EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.**

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**1. M-CV-0057487 Aspen Grove Condominium Ass'n vs. Miller, Pitt J., et al**

Plaintiff's Motion to Compel Answers to Form and Special Interrogatories, and Request for Production of Documents is granted. Defendant's supposed intention to file for bankruptcy at some unknown time in the future does not relieve him of his duties under the Discovery Act for purposes of this action. Defendant Pitt Miller shall serve verified responses to the subject discovery, without objections, by no later than November 5, 2013.

Plaintiff is awarded sanctions against Pitt Miller and/or his attorney, jointly and severally, in the amount of \$310.

**2. M-CV-0059447 Federal National Mortgage Ass'n vs. Napoles, Santiago, et al**

Appearance required. Defendants are advised that the notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C). Plaintiff's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

Defendants' Demurrer to the Complaint is overruled. Pursuant to Code of Civil Procedure section 1161a, plaintiff must allege (1) the property has been sold in accordance with Civil Code section 2924, and title has been duly perfected; (2) a written notice to quit the property has been served on all occupants; and (3) defendants continue in possession of the property. The complaint adequately alleges each of the requisite elements. (Complt., ¶¶ 1, 5, 6.) A three-day notice to quit is permitted where the property has been sold in accordance with Civil Code section 2924, as alleged in this case.

Defendants shall file and serve their answer to the complaint by no later than October 22, 2013.

**3. M-CV-0058823 Keh, Benjamin vs. Langsjoen, Jon, et al**

Appearance required on October 15, 2013 at 8:30 a.m. in Department 40.

**4. S-CV-0029141 Cooley, David, et al vs. Centex Homes**

Plaintiffs' Motion for Order Directing Service on In Ex Painting, Inc. by Secretary of State is granted. Plaintiffs shall be permitted to serve the summons and complaint in this action on In Ex Painting, Inc. by personally delivering the same to the Secretary of State of California, or to an assistant or deputy secretary of state.

Plaintiffs' Motion for Order Directing Service on Foremost Superior Marble Co., Inc. by Secretary of State is granted. Plaintiffs shall be permitted to serve the summons and complaint in this action on Foremost Superior Marble Co., Inc. by personally delivering the same to the Secretary of State of California, or to an assistant or deputy secretary of state.

If oral argument is requested, plaintiffs' request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**5. S-CV-0029429 New Leaf Modifications, Inc. vs. Acquisition Phoenix-Miami**

Defendants' Motion to Quash Civil Subpoena is denied. As the subpoena has been withdrawn, the motion is moot. Defendants' request for sanctions pursuant to Code of Civil Procedure section 128.5 is denied. This statute has no applicability to cases initiated after December 31, 1994. Code Civ. Proc. § 128.5(b)(1). The court declines to consider defendants' request for sanctions pursuant to Code of Civil Procedure section 128.7, set forth in their reply, to which plaintiff had no opportunity to respond.

**6. S-CV-0029431 Capper, James vs. Mass Mutual Insurance Co., et al**

Defendant Massachusetts Mutual Life Insurance Company's Motion to Compel Responses to Request for Production, Set Three, and Motion to Compel Further Responses to Special Interrogatories, Set Three, were continued to November 6, 2013 at 8:30 a.m. in Department 40.

**7. S-CV-0031639 Boedecker, Kevin vs. M2 Properties, et al**

Defendant/Cross-Complainant M2 Properties' Motion to Enforce Settlement Agreement pursuant to Code of Civil Procedure section 664.6 is granted. Defendant's separate request for an order enforcing the court's order in a separate action regarding payment of filing fees, and to add such filing fees as an element of the judgment in this action, is denied. Judgment shall be entered in favor of M2 Properties, and against Kevin Boedecker, in the principle amount of \$12,000, plus costs in the amount of \$60.

**8. S-CV-0031915 Lighting Systems, Inc. vs. Massey, Jayme A., et al**

The Motion for Summary Judgment is dropped. No moving papers were filed.

**9. S-CV-0032337 Davis, Jeffery D. vs. White, Jamil**

James Elmer's Motion to be Relieved as Counsel is granted, effective upon the filing of the proof of service of the signed order on plaintiff Jeffery Davis, and all parties who have appeared in this action. Cal. R. Ct., rule 3.1362(e). If oral argument is requested, defendant's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

**10. S-CV-0032549 Hofsaess-Fischer, Sharon vs. Westview Healthcare Center**

Plaintiff's request for judicial notice is granted. Defendants' Motion to Compel Arbitration and Stay Action is granted.

California law favors enforcement of arbitration agreements. *Armendariz v. Foundation Health Psychcare Svcs., Inc.* (2000) 24 Cal.4th 83, 97. The court must grant a motion to compel arbitration unless it finds that no written agreement to arbitrate exists, grounds to revoke the agreement exist, there has been a waiver of the right to compel arbitration, or there is the danger of unnecessary or conflicting rulings on common issues. Code Civ. Proc. § 1281.2. Because of the policy favoring arbitration, any doubts should be resolved against the party seeking a defense to arbitration "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24; *see also Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 320.

Plaintiff does not dispute that she signed an arbitration agreement which would apply to claims she makes in this action, but argues that she lacked capacity to sign the agreement because she was on pain medication, and did not have her prescription reading glasses at the time. Lack of voluntary assent to the agreement is a defense to enforcement of an arbitration provision. Civ. Code § 1556; *Ford v. Shearson Lehman American Express, Inc.* (1986) 180 Cal.App.3d 1011, 1027-1029. However, in support of the contention that she lacked mental capacity to consent to the arbitration agreement, plaintiff states only that she was "on significantly more medication than on the day of my deposition." (Hofsaess-Fischer decl., ¶ 2.) Plaintiff offers no further evidence regarding the effects of the medication, or her purported inability to comprehend what she was signing due to the medication. There is also substantial evidence to refute plaintiff's claim of incapacity. In deposition, plaintiff testified to her recollection that she signed the agreement during the daytime, and remembered the person who presented the agreement, his name, title, where he was sitting, and details regarding other documents she was asked to sign. (Hofsaess-Fischer dep., pp. 340-341, 350-351.) The nurses' notes on the day in question state that plaintiff was alert and oriented as to time, place and person, and was communicating her needs effectively. (Deft. Exh. F.) In light of the foregoing, plaintiff fails to satisfy her burden of demonstrating incapacity based on the medications she was taking at the time she signed the agreement.

Plaintiff also argues that she could not read and comprehend what she was signing because she did not have her prescription reading glasses with her at the time she signed the agreement. There is no indication that plaintiff communicated to defendant that she was unable to read what she was signing, that she asked for the documents to be read to her, or that she asked to defer signing the documents to a later time, after she located her reading glasses, or when her husband could be present to assist her in reading or understanding what she was signing. Plaintiff declares, “[i]t was my understanding that if I did not sign the agreements, I would not be able to stay at the facility. I also understood that if I didn’t sign the documents, I would be forced to pay for my stay out of my own pocket.” Plaintiff states no facts to explain how she arrived at these understandings. It is undisputed that plaintiff obtained a complete copy of the arbitration agreement prior to the deadline for her to rescind the agreement. In deposition, plaintiff testified, “[a]t the time that I received the pages from the chart, I put them in my desk drawer next to my bed and I left them there, because I was getting treatment at that time and I was very sick.” (Hofsaess-Fischer dep., p. 285:6-9.) Plaintiff offers no additional evidence regarding why her nausea left her incapable of reviewing the agreement for 11 days, or requesting that her husband or any other person review the documents on her behalf during the same time period. Thus plaintiff fails to satisfy her burden of demonstrating incapacity to read and understand the arbitration agreement due to not having her reading glasses with her at the time.

Plaintiff asserts that the arbitration agreement violated Health and Safety Code section 1599.81, as she was only presented with the third page of the three page document at the time she signed it. Plaintiff does not dispute that the page she signed states in large bold and red capital letters that by signing the agreement, she was agreeing to submit any medical malpractice claims to arbitration, and was giving up her right to a jury, and further states that she was agreeing that all disputes other than claims for medical malpractice would also be submitted to arbitration. As set forth above, plaintiff does not dispute that she obtained a complete copy of the three page document, which complies with Health and Safety Code section 1599.81, at least 11 days prior to her deadline to rescind the agreement. Plaintiff fails to establish that the agreement violated Health and Safety Code section 1599.81.

Plaintiff separately argues that the agreement should not be enforced due to undue influence, based on the same facts set forth above. For the reasons already stated, plaintiff fails to establish undue influence.

Plaintiff also argues that the arbitration agreement should not be enforced because it is unconscionable. Procedural unconscionability may be present when a weaker or adhering party is presented a contract drafted by a stronger party on a take-it-or-leave-it basis. *Mercurio v. Superior Court* (2002) 96 Cal.App.4th 167, 174. In this case, the arbitration agreement states in numerous places that admission into the facility will not be conditioned upon the assent to arbitration of any disputes. The agreement expressly provides that rescission of the agreement may be accomplished within 30 days. Plaintiff does not dispute that she had a full copy of the agreement in her possession at least 11 days prior to the deadline for her to rescind the agreement. There is substantial evidence that the arbitration agreement was not presented on a take-it-or-leave-it basis.

Plaintiff also fails to demonstrate substantive unconscionability. California law favors enforcement of arbitration agreements. *Armendariz v. Foundation Health Psychcare Svcs., Inc.*, *supra*, 24 Cal.4th at 97. Plaintiff argues that the arbitration agreement at issue contravenes the Elder Abuse Act provisions award attorneys' fees to a successful plaintiff. This argument lacks merit, as the agreement expressly states that each party shall bear its own costs and fees "[e]xcept as required by law." There is no evidence that the arbitration agreement in this case would otherwise limit any of plaintiff's statutorily available remedies.

Plaintiff fails to demonstrate that defendants waived their right to compel arbitration by their participation in this action since May 2013. A party claiming waiver bears a heavy burden of proof, and a waiver will not be lightly inferred. *Saint Agnes Med. Center v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1195. In this case, merely engaging in discovery, which both sides have done, does not establish that defendant unreasonably delayed in seeking arbitration, or substantially impaired plaintiff's ability to use the benefits and efficiencies of arbitration. *Id.* at 1203-1204. Defendants indicated their intent to move for arbitration early on in the lawsuit, and plaintiff does not demonstrate prejudice based on delay.

Finally, plaintiff fails to demonstrate how the presence of a cause of action under the Patient's Bill of Rights, which cannot be arbitrated, creates the potential for inconsistent rulings. *See Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1409 (inclusion of nonarbitrable cause of action under Health and Safety Code section 1430(b) did not provide sufficient grounds by itself to invoke court's discretion to deny arbitration under Code of Civil Procedure section 1281.2(c).)

Trial of plaintiff's third cause of action for violation of Health and Safety Code section 1430(b) shall be stayed pending the outcome of the arbitration. **An OSC re: status of arbitration shall be set for April 15, 2014 at 11:30 a.m. in Department 40.**

**11. S-CV-0032771 Wagenhals, Constance N. vs. Gibbons, Phillip E.**

Defendants' Demurrer to the Second Amended Complaint is overruled.

Plaintiff's first cause of action alleges professional negligence against defendants Phillip E. Gibbons and Phillip E. Gibbons, Inc. (collectively, "Gibbons"). Plaintiff sues in her individual capacity, and in her capacity as co-trustee of the Constance N. Elkus 2002 Revocable Trust ("the Trust"). A general demurrer does not lie to only part of a cause of action. *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2003) 108 Cal.App.4th 1028, 1046. If the essential facts of some valid cause of action are alleged, the complaint withstands general demurrer. *Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.

Gibbons owe no duty to plaintiff as a potential beneficiary of a greater share of Trust assets. *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 81-83. However, based on the allegations of the second amended complaint ("SAC"), Gibbons would owe a fiduciary duty to the trust, and plaintiff, as co-trustee of the trust, would be entitled to state a claim for damages to the trust. Plaintiff alleges that she acted as her mother's agent in communicating with Gibbons regarding the Trust, and that she sought the legal advice and assistance of Gibbons to transfer

two commercial properties into the Trust before her mother passed away, and that Gibbons failed to effectuate such transfers by preparing grant deeds for her mother to execute. Plaintiff alleges that the failure to prepare the grant deeds for her mother's signature damaged the trust in that plaintiff (in part based on her status as co-trustee of the trust) incurred substantial attorneys' fees and costs to attempt to have the commercial properties transferred into the Trust after her mother's death. (SAC, ¶¶12, 16, 18-20, 24.) Based on these allegations, plaintiff adequately states a cause of action for legal malpractice against Gibbons.

Plaintiff also adequately alleges a cause of action for negligent misrepresentation. Plaintiff alleges that after Gibbons was presented with handwritten instructions from her mother to amend the trust, he told plaintiff that he would follow said instructions. Plaintiff alleges that it was later discovered that Gibbons did not prepare an amendment to the trust, because he purportedly believed that such actions were unnecessary. The SAC does not establish that plaintiff was aware, prior to her mother's death, that Gibbons had not prepared an amendment to the trust. Plaintiff adequately alleges justifiable reliance as she alleges that she took no action to protect her interests prior to her mother's death in reliance on Gibbons' representation that he would prepare the amendment. (SAC, ¶¶ 40-44.)

Defendants shall file and serve their answer to the second amended complaint by no later than November 5, 2013. If oral argument is requested, plaintiff's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

## **12. S-CV-0033643 Sandler, Michael - In Re the Petition of**

The Petition to Approve Compromise of Disputed Claim for minor Daniel Alan Sandler is granted. If oral argument is requested, appearance of the minor at the hearing is excused.

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